

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| Federal-State Board on Universal Service |) | |
| |) | CC Docket No. 96-45 |
| Virgin Mobile USA, L.P. |) | |
| |) | |
| Petition for Limited Designation as an Eligible |) | |
| Telecommunications Carrier in the Commonwealth |) | |
| of Massachusetts |) | |
| _____ |) | |

**COMMENTS OF THE MASSACHUSETTS DEPARTMENT OF
TELECOMMUNICATIONS AND CABLE**

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Telecommunications and Cable
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I. INTRODUCTION

The Massachusetts Department of Telecommunications and Cable¹ (“MDTC”) submits these comments in reply to Virgin Mobile USA, L.P.’s (“Virgin Mobile”) Petition for Limited Designation as an Eligible Telecommunications Carrier in the Commonwealth of Massachusetts (“Petition”), filed on June 3, 2008 in the above-captioned proceeding.² On July 31, 2008, the MDTC filed a motion to extend the deadline for filing comments on the Petition until August 21, 2008. The FCC granted the MDTC’s motion. In this proceeding, Virgin Mobile seeks limited designation as an Eligible Telecommunications Carrier (“ETC”) in the Commonwealth of Massachusetts (“Massachusetts”).³ Virgin Mobile seeks ETC designation only to participate in the Universal Service Fund’s (“USF”) Lifeline program.⁴ Virgin Mobile does not seek designation to offer supported services in high-cost areas.⁵

To be designated as an ETC, Virgin Mobile must meet the requirements of the Telecommunications Act of 1996.⁶ Those requirements include, but are not limited to, either being designated as an ETC by a state commission or, if a state commission does not have jurisdiction, being designated by the Federal Communications Commission (“FCC”).⁷ Virgin

¹ The Massachusetts Department of Telecommunications and Cable (“MDTC”) has the statutory duty to regulate telecommunications and cable companies. Mass. Gen. Laws c. 25C § 1. The MDTC is the exclusive state regulator of telecommunications services within the Commonwealth of Massachusetts.

² *In the Matter of Federal-State Board on Universal Service*, CC Docket No. 96-45, Petition (June 3, 2008).

³ *Id.* at 1.

⁴ *Id.*

⁵ *Id.*

⁶ 47 U.S.C. § 254(e).

⁷ 47 U.S.C. § 214(e)(2), 47 U.S.C. § 214 (e)(6).

Mobile claims that the MDTC has affirmatively declined to exercise jurisdiction over Commercial Mobile Radio Service (“CMRS”) providers.⁸ Virgin Mobile relies on a Department order stating that the Department does not regulate the entry, rates, or other terms and conditions of CMRS service.⁹ Therefore, Virgin Mobile suggests that the FCC has the statutory authority under 47 U.S.C. § 214(e)(6) to designate Virgin Mobile as an ETC.¹⁰

For the reasons set forth below, the MDTC disagrees with Virgin Mobile’s position. The MDTC has primary jurisdiction to decide if a CMRS provider is an ETC and intends to exercise that jurisdiction. Accordingly, the MDTC requests that the FCC dismiss Virgin Mobile’s Petition so that Virgin Mobile may file a petition in the appropriate forum, thus allowing the MDTC to decide whether to designate Virgin Mobile as an ETC in the Commonwealth of Massachusetts.

II. ARGUMENT

A. Virgin Mobile failed to contact the MDTC for designation as an ETC prior to filing the instant petition with the FCC.

The FCC has stated that a carrier seeking ETC designation should first contact the state commission and give the state commission “an opportunity to interpret state law” to see if the state commission has jurisdiction.¹¹ “Each carrier should consult with the state commission to

⁸ *Petition* at 5.

⁹ *Id.* at 5; *See Investigation by the Department of Public Utils. upon its own motion on Regulation of Commercial Mobile Radio Services*, D.P.U. 94-73 at 14 (August 5, 1994) (“CMRS Order”). (The MDTC is the successor of the Massachusetts Department of Public Utilities for matters relating to telecommunications and cable.)

¹⁰ *Petition* at 6.

¹¹ *See In Re Federal-State Joint Board on Universal Service*, 15 F.C.C.R. 12208, 12264 p. 113 (June 8, 2000) (“Universal Service”).

receive” an affirmative statement that it lacks jurisdiction “rather than relying on notifications that may have been provided to similarly situated carriers.”¹²

Here, Virgin Mobile has not consulted with the MDTC regarding its petition to be designated as an ETC. Rather than follow established FCC precedent, Virgin Mobile simply bypassed the MDTC and filed the instant petition with the FCC for designation as a limited ETC. Virgin Mobile suggests that a 1994 Order issued by the MDTC’s predecessor agency constitutes an affirmative statement that the MDTC lacks jurisdiction to determine whether a CMRS provider qualifies as an ETC.¹³ For the reasons explained more fully in section B below, the MDTC disagrees with Virgin Mobile’s characterization of the 1994 Order (“CMRS Order”).

In any event, Virgin Mobile was required to contact the MDTC for an affirmative statement that the MDTC lacks jurisdiction. Since it failed to do so, Virgin Mobile has violated past federal practice and precedent relating to ETC designations. Accordingly, the FCC should dismiss Virgin Mobile’s request to be an ETC as the petition should appropriately be filed with and decided by the MDTC.¹⁴

¹² *Id.* See also *Parties are Invited to Comment on Tracfone Wireless’ Petition for Designation as an Eligible Telecommunications Carrier in Connecticut and Massachusetts*, CC Docket 96-45 at *1 n.1 (December 1, 2004) (noting that Tracfone should provide copies of its petitions to the MDTC).

¹³ *Petition* at 5-6.

¹⁴ The MDTC notes that, to the extent that Virgin Mobile argues that dismissal of the Petition will result in delay in the review of the offering of its Lifeline service, such concerns are overblown. In addition to the instant Petition, Virgin Mobile’s related Petition For Forbearance, urging forbearance from enforcement of section 214(e)(1)(A) of the Telecommunications Act of 1996, is still pending before the FCC. Section 214(e)(1)(A) requires ETCs to offer USF-supported services over its own network facilities or through a combination of its own facilities and resale services. There is no dispute that Virgin Mobile does not satisfy this requirement. The FCC’s consideration of Virgin Mobile’s Petition For Forbearance together with the instant Petition would undoubtedly require considerable scrutiny and time for deliberation and analysis so that requiring Virgin Mobile to re-file its documents with the MDTC would not cause undue delay. See *TracFone Wireless’ ETC Petition in Massachusetts*, FCC 08-100 (while petition was filed November 9, 2004, it was not allowed by the FCC until April 11, 2008) (cited below at n. 21).

B. Virgin Mobile has mischaracterized the nature and scope of the CMRS Order.

In its petition, Virgin Mobile relies on a 1994 CMRS Order issued by the MDTC's predecessor agency, the Massachusetts Department of Public Utilities ("MDPU"), to suggest that the MDTC does not have jurisdiction over ETC designation of CMRS providers.¹⁵ In the CMRS Order, the MDPU ruled that the Omnibus Budget Reconciliation Act of 1993 preempted "state and local entry and rate regulation of CMRS as of August 10, 1994."¹⁶ The MDPU also determined that it would not regulate "other terms and conditions" of CMRS in Massachusetts.¹⁷

Relative to the regulation of "other terms and conditions" of CMRS providers, the MDPU limited the meaning of "other terms and conditions" in the text of its Order. In pertinent part, the Order stated:

The Department also sought comments on the regulation of *other terms and conditions* of [CMRS] in Massachusetts, *such as liability of the company, use of service, and consumer protection issues*, and the repeal of 220 C.M.R. §§ 35.00 et seq. which provides procedural rules for the Department's regulation [of CMRS rates and market entry].¹⁸

Notably, the discussion of regulation of "other terms and conditions" in the CMRS Order does not include ETC designation of CMRS providers or regulation of whether CMRS providers should receive benefits from the USF.¹⁹ This is because in 1994, at the time of the CMRS Order, CMRS providers were not yet entitled to receive funding under the USF. In fact, prior to the

¹⁵ CMRS Order.

¹⁶ *Id.* at 1.

¹⁷ *Id.* at 14.

¹⁸ *Id.* at 2 (emphasis added).

¹⁹ *Id.*.

Telecommunications Act of 1996, universal service was funded by interexchange carriers (IXCs) and subsidies were only provided to local telephone companies.²⁰

Since CMRS providers were not eligible for receipt of funding under the USF at the time of the CMRS Order, the suggestion that the MDTC ceded jurisdiction over the designation of CMRS providers as ETCs for purposes of the USF is illogical and unsupported. The scope of the CMRS Order never was intended to reach matters involving the USF or ETC designation and any attempt to otherwise interpret the Order does an injustice to the clear language of the Order quoted above. Nor has the MDTC ever interpreted the CMRS Order since then in a manner suggesting that it has ceded such jurisdiction, and Virgin Mobile has failed to point to any subsequent statements by the MDTC to that effect. Had Virgin Mobile contacted the MDTC, as it was required to under federal law, to obtain an affirmative interpretation from the Department concerning its jurisdiction to review wireless (i.e. CMRS) ETC petitions, the MDTC would have stated to Virgin Mobile that it does in fact exercise jurisdiction over these matters. Accordingly, Virgin Mobile's reliance on the CMRS Order as a statement of the MDTC's position on USF funding for CMRS providers is clearly erroneous. As such, Virgin Mobile's request to be designated as an ETC by the FCC should be dismissed. Rather, the appropriate body to decide Virgin Mobile's petition is the MDTC.

²⁰ See, e.g., *In Re Federal-State Board on Universal Service*, 13 F.C.C.R. 11501, 11504 para. 7 (April 10, 1998) (noting that prior to the Telecommunications Act of 1996, charges were assessed on long distance carriers and subsidies were provided to local telephone companies); Symposium, *The Sources of Statutory Meaning: An Archaeological Case Study of the 1996 Telecommunications Act*, 53 SMU L.Rev. 143, 150-151 (2000).

C. The MDTC is uniquely positioned to determine whether ETC designation of Virgin Mobile is in the public interest for Massachusetts consumers.

Although the MDTC forebore from commenting on the TracFone Wireless (“TracFone”) Petition for ETC designation, the MDTC’s experience since the FCC Order granting TracFone ETC status in Massachusetts (“TracFone ETC Order”) compels the MDTC’s determination that it is the appropriate regulatory authority to rule on Virgin Mobile’s instant Petition.²¹ As a result of the TracFone ETC Order, TracFone is currently offering Lifeline service in Massachusetts. During the few short months that TracFone has been offering that service, the MDTC has encountered numerous issues with the implementation of TracFone’s Lifeline service. For example, information gathered by the MDTC has revealed that terms and conditions for TracFone’s Lifeline plan require “a credit card, debit card, checking or savings account from a major bank.”²² However, many Lifeline consumers are not able to fulfill this part of the terms and conditions as they often have bad credit and do not maintain bank accounts. As Virgin Mobile did not discuss terms and conditions for its plan in its filing with the FCC, the MDTC is not aware if similar terms and conditions might apply. The MDTC would seek information from Virgin Mobile regarding such terms and conditions in a review of whether Virgin Mobile’s petition is in the public interest.

The MDTC also notes some issues relating to the accessibility of information about TracFone’s Lifeline service. By searching on TracFone’s website for “Lifeline”, a consumer

²¹ *In The Matter of Federal-State Joint Board on Universal Service, TracFone Wireless, Inc., Petitions for Designation in the States of Alabama, Connecticut, Delaware, Florida, Massachusetts, New Hampshire, New York, North Carolina, Pennsylvania, Tennessee, Virginia, and Washington D.C.*, Order, FCC 08-100 (April 11, 2008).

²² See Cellular Phone Plans | Tracfone, http://www.tracfone.com/autopay_enrollment/new_BP_Program.jsp?nextPage=new_BP_Program.jsp&task=autopay&AID=SAC2# (follow “Terms and Conditions” hyperlink) (last visited on Aug. 15, 2008).

receives six hits, of which only the fourth goes to the Lifeline plan.²³ The MDTC is concerned that consumers may have difficulty finding information on the Lifeline service on TracFone's website. While the Department is aware of Virgin Mobile's proposed marketing efforts as outlined in the Petition, the MDTC believes a thorough review of such marketing efforts is necessary to ensure that designation of Virgin Mobile as an ETC in Massachusetts would serve the public interest. As the exclusive regulator of telecommunications services in Massachusetts, the MDTC has expertise regarding the Massachusetts telecommunications market and is uniquely positioned to determine whether ETC designation is in the public interest for Massachusetts consumers. In fact, the MDTC has recently reviewed a petition for ETC designation by a wireline carrier, which was denied because of concerns that the designation would not serve the interests of Massachusetts consumers.²⁴ In light of the MDTC's unique knowledge of the Massachusetts telecommunications market and its consumers, the MDTC believes that it is the appropriate regulatory agency to review Virgin Mobile's Petition.

III. CONCLUSION

Based on the foregoing, the MDTC submits that Virgin Mobile has not complied with FCC practice and procedure by failing to obtain an affirmative statement from the MDTC that it lacks jurisdiction over wireless ETC designation. Moreover, Virgin Mobile has misconstrued the scope of the CMRS Order. Accordingly, because the MDTC is the appropriate regulatory

²³ See Tracfone | Prepaid Cell Phone, <http://www.tracfone.com> (type "Lifeline" in search box in upper right) (last visited on Aug. 15, 2008).

²⁴ *Petition of VCI Company for designation as an eligible telecommunications carrier in Massachusetts pursuant to Sections 214(e)(2) and 214(e)(6) of the Communications Act of 1934, as amended*, Massachusetts Dept. of Telecommunications and Cable, D.T.C./D.T.E. 07-8 (May 21, 2008).

authority to review whether Virgin Mobile should be designated as an ETC in Massachusetts, the MDTC urges the FCC to dismiss the Virgin Mobile Petition.

Respectfully Submitted,

/s/
Sharon E. Gillett
Commissioner

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